Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

1120 CENTRAL CONDOMINIUMS OWNERS ASSOCIATION, MICHELLE A. BRENDEL and BRUCE M. STARK,

Petitioners,

v.

CITY OF SEAL BEACH, EDNA WILSON, GWEN FORSYTHE, FRANK LASZLO, MARILYN HASTINGS, WILLIAM DOANE, GEORGE BROWN, JERRY BANKSTON, LEE WHITTENBERG, BARRY CURTIS, MICHAEL CHO, and DON COX, dba COX CONSTRUCTION CO.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the City of Seal Beach, CA may take malicious, irrational and plainly arbitrary actions in reprisal for petitioners exercise of their First Amendment rights in (1) making warrantless searches of their property; (2) obtaining inspection warrants, ex parte, knowing petitioners would contest the issuance and without notice to petitioners as required by court rules; (3) the City's acts were a pattern and practice and continuing violation of petitioners' civil rights; and (4) were petitioners held to a higher standard than Rule 56 of the Federal Rules of Civil Procedure required in opposing summary judgment against the City and Cox?

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Petitioners 1120 Central Condominiums Owners Association, Michelle A. Brendel, and Bruce M. Stark, pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this matter entered August 24, 1995, unreported.

CITATIONS TO THE OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit in this matter is unreported but is reproduced in Appendix A, pp. 1 - 11, infra. The Ninth Circuit's order denying petitioners' motion for reconsideration and suggestion for reconsideration en banc is unreported and is reproduced in Appendix B, p. 12, infra. The district court's order granting partial summary judgment entered December 27, 1993, in favor of the City is unreported and is reproduced in Appendix C, pp. 13 - 30, infra. The district court's order granting summary judgment in favor of the City entered February 7, 1994, is unreported and is reproduced in Appendix D, pp. 31 - 51, infra. The district court's order granting summary judgment in favor of Cox entered February 22, 1994, is unreported and is reproduced in Appendix E, pp. 52 - 54, infra.

JURISDICTION

The decision of the Court of Appeals was entered on June 22, 1995. Petitioners' motion for reconsideration and

suggestion for reconsideration en banc was denied in an order entered August 24, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in Appendix F, pp. 55 - 61, infra.

STATEMENT OF THE CASE

Petitioners Brendel and Stark have been residents of the City of Seal Beach, CA since 1980, and have been active in civic affairs, speaking before the City Council and Planning Commission on issues of public policy, leading citizen groups and publishing letters and articles in local newspapers. In 1987, petitioners led a citizens group in the city in qualifying an initiative to reform zoning, inter alia, which many believed to be exclusionary against minorities and low income families. The city opposed the measure and used the police to keep petitioners under constant surveillance. A police captain accosted petitioners who were on the public street with a black friend and told them to get out of town as the city did not want them.

During 1989 and 1990, petitioners opposed a housing development supported by the city which would be built on Indian burial grounds. Petitioners led a citizens group in defeating a referendum on the project.

Petitioners maintain their professional offices in Seal Beach; Brendel as a licensed psychologist treating many minority patients and Stark as an attorney, specializing in civil rights and labor law. In March of 1989, city police burst into Brendel's office demanding to know why a black relative of a patient was waiting in a car parked in front of her office. Brendel complained to the Orange County Grand Jury who was investigating city police practices at the time. The City took no action.

In June of 1989, petitioners sought to remodel a duplex they owned in the city. In order to get city permission to remodel, petitioners were required to provide three parking spaces per residence, or six, when city code required only two per unit, or four. Petitioners were required to have greater set-backs than required by city code, were not allowed to build a wall to their property line while the neighbor was allowed to do so, and were required to obtain a special permit to have a planter.

In January, 1990, Stark spoke before the City Council on behalf of a female employee of the police department who had been summarily dismissed. The City was under a consent decree with the Department of Justice to hire female police officers.

In July of 1990, Stark spoke in behalf of a Korean police officer who had been the victim of racial slurs in the form of radio messages that a road kill was found for his lunch. He had also refused to follow instructions from his superiors to roust blacks and Hispanics.

During 1990, construction in remodeling the duplex was in progress by Cox of Cox Construction Co. Cox represented that he could and would secure City

approval and permits for a common area for the proposed condos in lieu of the two additional garage spaces and contracted with petitioners accordingly.

In September, 1990, the City approved condo-conversion of the duplex, reciting numerous inspections of the property. A final inspection of the property was made by the City in October, 1990. A notice of completion was recorded with the County of Orange in November, 1990, and the condos were leased to two tenants.

In December, 1990, the City approved the CC&Rs for the condo-conversion which provided, inter alia, for two parking spaces per unit and the City's right to inspect the common areas for cleanliness and maintenance upon request.

In January, 1991, the City claimed to have received complaints from two residents about the property. Discovery revealed one was the wife of an ex-City Council member and his neighbor, both of whom were spokespersons for the housing tract on Indian burial grounds, which petitioners had opposed. The ex-City Councilman and his wife, along with other City officials, were the guests of Cox at a lavish Christmas party the month before.

In April and June of 1991, petitioners' offices were vandalized with a can of construction paint thrown through the window and super-glue inserted in the door locks. These were not the first nor last acts of vandalism against petitioners' offices.

In June, 1991, the City got the first inspection warrant in over a decade for alleged construction defects, without

notice to petitioners. It was never served. Rather, a city official, Cho, went to the condos on a Sunday to harass a leasee into allowing him to enter, which was refused. Cho is an attorney, who at the time was serving as an intern for the City in the Planning Department with his childhood friend, Curtis, an administrative assistant.

In July, 1991, the City got a new inspection warrant, again without notice to petitioners, which allowed breaking and entering of the condos, alleging they posed an immediate threat to health and safety. Petitioners were never notified nor served with this warrant, although the leasees of the condos were informed. This caused grave concern with the leasees that their health and safety were in danger. Two days after issuance of the warrant petitioners' offices were again vandalized with paint.

On July 19, 1991, petitioners and their attorney met with the City to resolve the dispute. The City contended its only concern was that City plans comported with actual construction and permit fees were paid This was the first that petitioners learned Cox had breached his contract in failing to secure City permits and approvals. The City Code requires the City to report contractors performing work without permits or approvals to the Contractors State License Board. The City did not do so; rather petitioner Brendel had to file a complaint for which Cox was fined. Petitioners submitted plans to the City and agreed to pay any fees upon billing. They have never been billed.

The City then demanded a public hearing be held in the form of a conditional use permit, although such is not required under City codes. The City used the public

hearing as a carefully orchestrated platform to defame petitioners on public TV, claiming they were land developers, attempting to sabotage City planning and zoning with illegal units, violating the law in not obtaining permits and approvals, and maintaining an unsafe building. That Cox had failed to obtain permits and approvals under his contract was dismissed as immaterial.

In November, 1991, after receiving threats from Cox Construction Co., petitioner Brendel secured a restraining order against Cox for a three year period. The City police were notified of the court order, as required, but the City police refused to enforce it in spite of numerous violations.

In December, 1991, the City Planning Commission refused to approve the common areas, allegedly on the grounds it might be used for illicit purposes. Discovery revealed that prior to the public hearing, Planning Assistant, Curtis, stated,"This is our chance to get Stark." That this whole process was contra to the agreement worked out between petitioners' attorney and the City Attorney was dismissed by the Planning Commission with the statement that the City Attorney cannot speak for us.

On January 14, 1992, the City approved the parcel map for the condos attesting that the property was in compliance with all local ordinances.

On January 27, 1992, the City Council approved the common area but with conditions which amounted to destruction of the property in demanding removal of a bearing wall, previously approved by the City Engineer in the building plans. The City also demanded that such contraband as a portable microwave oven and cabinetry

be removed from the common area. Nothing in City Codes prohibit residents from possessing such items and common areas for condos are provided for by the City Code. Numerous condos in the city have common areas.

During the televised proceedings before the City Council, Cho presented photographs showing the work in progress on the common area in petitioners' condos. Thus, the City knew prior to the final inspection that the work was being done by Cox. Cho also presented the results of an asset search he performed on petitioners, publishing the fact that petitioners had a second home in the mountains.

In March, 1992, more paint was thrown on petitioners' offices.

In April, 1992, oil was poured on the ramp to petitioners' offices used by disabled clients. Also in April, petitioners' son was issued a Stop Work Order by the City while moving a neighbor's furniture, and Brendel, who was disabled at the time, was prevented from entering her home by City police due to a sporting event nearby.

On or about July 30, 1992, petitioners received notice of the City Council's decision on the common area of the condos approved in February of 1992 on second reading, which was different from that passed on January 27, 1992. No new public hearing, notice, nor City Council action was taken on the new ruling as required by law.

In August, 1992, oil was poured in the window air conditioner of petitioners' offices. In October, 1992, petitioners' offices were again vandalized with eggs.

On December 8, 1992, petitioner Brendel complained to the City of staff incompetence in allowing the flooding of petitioners' offices and surrounding buildings due to failure to start pumps during a rain storm.

On December 9, 1992, the City demanded entry to inspect the leaseholds of tenants in units A & B of the condos, which had never been at issue. The City's letter was sent to the tenants alleging the property was an immediate threat to health and safety.

On December 14, 1992, Brendel wrote the City to stop harassing the leasees and needlessly creating fear and alarm. The City has never specified what constituted an immediate threat to health and safety, nor ordered any corrections; rather, the City seemed intent on striking fear in the leasees and harassing petitioners.

On December 16, 1992, Planning Assistant Curtis presented himself to a tenant at 1120 Central, a British subject, demanding to inspect the 1120 Central Condominiums Owners Association laundry room, which had never been at issue. The tenant was not advised of her right to refuse entry. Discovery confirmed the lease provision that the tenants have only a license to use the laundry room, it was kept locked, not open to the public, and such use could be revoked at any time by removal of the laundry machines. The laundry room remained in the custody and possession of the Association at all times.

Petitioners were never advised of this warrantless search by the City, nor by the tenant, until after suit was filed. Curtis admitted at his deposition he was not qualified as a building inspector.

In February, 1993, petitioner Brendel and a neighbor were pursued by City Planning staff in a City car, tailgating Brendel's vehicle to the point she feared to stop lest she be hit by the City car. This continued for over fifteen minutes.

On March 2, 1993, without any prior notice to petitioners nor a request to inspect, the City secured yet another inspection warrant, ex parte, allowing forceable entry, and again alleging the building was an immediate threat to health and safety. The warrant as issued was a general warrant to the entire building even though the dwelling units, A & B, were never contested as being uninspected nor not according to plans. The obvious intent was to harass petitioners and their leasees. The City would have one believe the building was a constant threat to health and safety from the time of its completion and final inspection. The warrant was supported by the declaration of Curtis who failed to advise the court of his incompetence as a building inspector and his bias towards petitioners. Nor was the court advised this was the third inspection warrant for the same property.

The warrant was issued on a Tuesday, March 2, 1993, and held by the City until 4:45 p.m. on Friday, March 5, 1993, before mailing certified mail to petitioners' offices. The speciousness of the City's motives is evidenced by this delay for an immediate threat to health and safety should cause the City to move with alacrity. No effort was made to serve petitioners personally even though petitioner Stark attended a Planning Commission meeting the evening of March 3, 1993, where the City Attorney was present. The obvious purpose of waiting until the

weekend was to prevent petitioners from going to court to quash the warrant.

Under California Code of Civil Procedure § 1020 (C.C.P. § 1020), Appendix F, service may be made by registered mail, return receipt requested, and a receipt purporting to be signed by the addressee creates a disputable presumption that such notice was received. The notice was delivered on a Saturday at petitioners' offices while petitioners were at their second home in the mountains. The return receipt is signed by a stranger, not purporting to be that of addressees. The notice, required by the court to be served 24 hours in advance, was not received until Monday morning, March 8, 1993, after the warrant was executed, when petitioners opened their office. C.C.P. § 12, 12a and 12b, Appendix F, provides that Saturdays and Sundays are holidays and not within the 24 hour notice period.

A leasee's deposition revealed that she returned home from her night shift as a registered nurse on Monday, March 8, 1993, at 8 a.m. and found the street filled with police cars and City officials throughout her apartment. The tenants lodged a strong complaint with petitioners about their being disturbed in their right to quiet enjoyment and refused to release at the end of their lease term. The City never reported any threats to health and safety they may have found.

Petitioners filed suit on April 12, 1993, for violation of their First, Fourth, and Fourteenth Amendment rights. Vandalism of petitioners' offices ceased at this point.

On August 18, 1993, Planning Assistant Curtis and a building inspector purportedly were checking the installation of a window where petitioners' son was doing yard work. The glass company truck was parked in front of the City's car. The City issued petitioners' son another Stop Work Order while he was raking leaves even though he had nothing to do with the window installation.

On November 15, 1993, a black client leaving petitioners' offices was rousted by City police.

On March 8, 1994, petitioner Brendel was accused by City police of dumping hazardous waste in front of her home. She was rinsing out a bucket.

On April 7, 1994, the City Clerk challenged petitioners right to vote.

On September 13, 1994, a City building inspector rousted petitioners' son while he was painting a window sill, claiming he was doing unpermitted work.

Early in 1995, petitioner Brendel was granted another restraining order against Cox.

On July 24, 1995, a City building inspector accused petitioners' son of doing electrical wiring without a permit. In fact, he was painting an apartment. The electrical wiring the inspector saw was a television cable laying behind the apartment.

Following the City's "discovery" that Cox had not obtained City permits and approvals for the common area of 1120 Central, and his being fined by the State Contractors License Board, the City awarded Cox a contract to repair the City pier, allowed him to build without paying required park fees, and granting him a demolition permit to remove asbestos without approval by the Air Quality

Management District which is required. This is more than Cox getting along with City officials as the Ninth Circuit held, it is quid pro quo.

On June 4, 1993, the district court dismissed the original complaint with leave to amend the second cause of action, but denying leave to amend the first cause of action, holding erroneously, the petitioners conceded they could not state a cause of action for all prior acts alleged, when no such concession was made. Rather, petitioners had pled a pattern and practice of continuing violation of their civil rights.

On December 17, 1993, the district court granted partial summary judgment to the City, holding in relevant part at Appendix C, p. 29: "[P]laintiffs have raised a genuine issue as to whether the inspections were part of a pattern of selective enforcement of purported code violations against those who spoke out at City Council meetings on behalf of minority rights. Therefore, plaintiffs have raised a genuine issue as to whether a policy or custom of the City caused their alleged constitutional injuries."

Notwithstanding the foregoing, the district court granted the City summary judgment on February 2, 1994, and granted Cox summary judgment on February 16, 1994.

REASONS FOR GRANTING THE WRIT

The decision below, which treats a basic and recurring question arising under the First and Fourth Amendments of the U.S. Constitution, creates a conflict in the circuits, on its own terms, impossible to reconcile with this Court's decision in *In re Stauffer Chemical Co.*, 464 U.S. 165 (1984), affirming on estoppel grounds the decision in *In re Stauffer Chemical Co.*, 14 Environmental Rep. Cases (BNA) 1737 (D. Wyo., 1980), aff'd. 647 F.2d 1075 (10th Cir., 1981). This is also a matter of first impression before this Court as to under what circumstances an ex parte civil, administrative inspection warrant may be issued apart from a neutral administrative plan or a state statutory scheme for ex parte warrants when it is known petitioners would oppose the warrant.

The decision below also creates a conflict with the D.C. circuit's decision in *Valentino v. U.S. Postal Service*, 674 F.2d 56 (D.C. Cir., 1982), as to a continuing violation in civil rights cases as well as this Court's decisions in *United Air Lines v. Evans*, 431 U.S. 553 (1977) and *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

The Ninth Circuit's decision as to permission to conduct a warrantless search is an important federal question in conflict with this Court's decisions in *Chapman v. U.S.*, 365 U.S. 610 (1961), and *Stoner v. California*, 376 U.S. 483 (1964).

Finally, the court below held petitioners to a higher standard to resist a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure than enunciated in this Court's decision in *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

1. In *Stauffer*, supra, the district court found ex parte warrant procedures used by EPA improper where the federal agency was aware Stauffer would contest the issuance of the warrant permitting private, contract inspectors to enter their premises where trade secrets were at stake. Noting this was a matter of first impression, the district court held the ex parte procedures used by EPA violated the principles of fundamental fairness and hence were unreasonable. See *Camera v. Municipal Court*, 387 U.S. 523 (1967), where "reasonableness is still the ultimate standard." at 539. The same problem arose again in Tennessee, reaching this Court in 1984, which affirmed on estoppel grounds the decision of the 10th Circuit, supra.

As with the EPA, the City knew to an absolute certainty that petitioners would object to a warrant to search the two living units, which had never been questioned, as they had done on two prior occasions. Petitioners had repeatedly told the City to leave the leasees alone and stop frightening them with claims of an unsafe building. Unlike EPA, the City never requested permission to inspect the two dwelling units of the leasees. Petitioners never objected to the inspection of the common area, which was provided in the CC&Rs, for cleanliness and maintenance. However, the City never requested this prior to seeking a warrant.

There is no bright line test with the state of the law at present to distinguish between the legitimate interests of the state to eliminate blight in housing and the misuse of the state's power by petty officials to secure inspection warrants to stifle dissent. Clearly, freedom of speech

requires greater protection than trade secrets, or at least is equally as compelling.

Absent direction by this Court, the lower courts fall back on criminal search warrant provisions. It is obvious that in criminal matters ex parte proceedings are necessary for the fruits and instrumentalities of a crime may be easily disposed of or moved. Such an imperative does not exist in a civil inspection warrant for a blighted structure cannot be cured or moved during a short notice period. The remedy in a criminal matter for an improper warrant is exclusion of the evidence. There is no remedy in a civil inspection warrant for the evil is in the inspection itself, frightening tenants and harassing the owners. Nor would the legitimate ends of a civil inspection warrant be thwarted by allowing the owner to appear and contest the warrant. Dispassionate officials could produce evidence of an area wide inspection of blight, or a general plan of regular inspections, or photographs of a blighted area. This is consonant with this Court's holding in *Marshall v. Barlow's Inc.*, 436 U.S. 307, 323-324 (1978):

> "A warrant, by contrast, would provide assurances from a neutral officer that the inspection is *reasonable* under the Constitution, is *authorized by statute*, and is pursuant to an *administrative plan* containing specific *neutral criteria.*" (emphasis added).

In the instant matter, the warrant was not "reasonable" in that the dwelling units had never been contested and by the City's own admission, they had been inspected many times. This was an unreasonable search, designed to harass petitioners' leasees into vacating which was accomplished. Ex parte proceedings were not "authorized

by statute" but required notice per court rules. Appendix F. There was no "administrative plan" but rather petitioners' property was singled out for the first such warrant in over a decade. Nor was there any "neutral criteria" cited in the warrant. This was a general warrant long held unconstitutional. *U.S. v. Dubrofsky,* 581 F.2d 208 (9th Cir., 1978).

This case epitomizes the need for this Court to distinguish between criminal and civil inspection warrants. Fundamental fairness and due process requires petitioners' right to be heard before their Constitutional rights are imposed upon by over zealous or biased public officials. Nor is this a new concept in constitutional law. As this Court held in *Fuentes v. Shevin,* 438 U.S. 154 (1978):

> "For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. (Citations omitted) It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo,* 380 U.S. 545 (1965).
>
> . . .
>
> For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that fairness can rarely be obtained by

secret, one-sided determination of facts decisive to rights. . . ."

With public discontent running high against government interference in their lives and businesses, it is appropriate for this Court to set standards for issuance of civil inspection warrants and give the affected parties an opportunity to be heard before their rights are infringed.

2. Over the years this Court has held that warrantless searches are generally unreasonable to both residential and commercial property. *Camera*, supra, and *See v. Mendenhall*, 446 U.S. 544 (1967). Admittedly, the City conducted a warrantless search of petitioners' property on December 16, 1991, relying on the consent of a leasee, a British subject impressed by the "official" status of the City's Planning Assistant, Curtis, and without knowledge of her right to object. See *See v. Mendenhall*, supra. In *Stoner v. California*, 376 U.S. 483 (1964), a hotel clerk could not consent to the search of a guest's room as this would reduce the Fourth Amendment to a nullity and leave the guest's room secure at the discretion of the hotel. The same rationale applies to a tenant's consent to the search of the landlord's property. This was not a criminal matter where time was of the essence in seeking the fruits and instrumentalities of a crime, but a civil matter where a warrant could have been secured.

The Ninth Circuit applied a three-pronged test from a criminal case, not civil, to determine third party consent: (1) whether the third party had an equal right to access of the premises searched; (2) whether the defendant was present at the time the third party consented; and (3) if so, whether defendant actively opposed the search.

Appendix A, p. 4. This does not comport with *Stoner*, supra, where a hotel clerk could not allow a search while the defendant was absent. It has little or no applicability to a civil matter where a warrant could have been secured, and time was not of the essence. It also disregards the numerous writings by petitioners to the City to stop harassing the leasees with claims their residence posed an immediate threat to health and safety. Curtis was admittedly not a qualified building inspector and the real reason for the warrantless search was to frighten petitioners' leasees into vacating the dwelling unit to damage petitioners' income.

Under these circumstances this Court should review the warrantless search as an important federal question which conflicts with *Stoner*, supra, and *Chapman v. U.S.*, supra.

3. One of the most cherished rights in a free society is the First Amendment right to freedom of speech. Democracy, to be viable, must be participatory with the concomitant right to speak out on public issues. Petitioners have exercised their First Amendment rights on matters of public concern on minority rights to City employment, irresponsible development of a housing tract on Indian burial grounds, incompetence of City staff and exclusionary zoning practices, *inter alia*. The petitioners speaking out on public issues is the genesis of the City's actions since 1987.

If the lower court decision is allowed to stand, which is in conflict with this Court's decisions on First Amendment rights, a chilling effect will result affecting all residents of the City in speaking out on public policy

issues. See *Pickering v. Board of Education*, 391 U.S. 563 (1968).

Following the teachings of *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), petitioners pled a pattern and practice of continuing harassment and deprivation of First and Fourteenth Amendment rights to freedom of speech and equal protection of the laws. The court below disregarded the pleadings and treated the pattern and practice events as discrete acts for limitation purposes.

This conflicts with the D.C. Circuit's decision in *Valentino v. U.S. Postal Service*, 674 F.2d 56 (D.C. Cir., 1982), as to continuing violation in civil rights cases as well as this Court's decision in *Monell*, supra. As *Valentino* holds, a continuing violation is a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the limitations period.

In the instant matter, the City's acts began in 1987 and continue to the present day. They are related acts, arising out of the Planning Department of the City, which includes building inspectors, directed at petitioners' property and their source of income through their professional offices and clients. The City has maintained a discriminatory system both before and during the limitations period as to minority rights in employment, exclusionary zoning, and police reprisals against those who speak out in opposition to these practices, which was the subject of an Orange County Grand Jury investigation. Even the district court noted, albeit obliquely, the continuing nature and pattern and practice of the City as alleged by petitioners. Appendix C, pp. 22 et seq.

This Court's review is necessary to resolve the conflict in the circuits as to continuing violation and pattern and practice in civil rights and relevant decisions of this Court.

4. Once a prima facie case is established either by the introduction of actual evidence or reliance on a *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) type presumption, summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a civil rights dispute is the elusive factual question of intentional discrimination. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *U.S. Postal Service v. Aikens*, 460 U.S. 711 (1983). A defendant's intent to discriminate is a pure question of fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-288 (1982)

In the equal protection context, just as in a civil rights disparate treatment case, discriminatory intent need not be proved by direct evidence. Determining the existence of a discriminatory purpose demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. *Rogers v. Lodge*, 458 U.S. 613 (1982).

Petitioners presented direct evidence of discriminatory intent with Planning Assistant Curtis' statement to "get Stark" via deposition. Petitioners also presented evidence of disparate treatment under *Teamsters v. U.S.*, 431 U.S. 324 (1977), that they were simply treated differently from those who did not speak out on minority issues. See n.15. They were the only ones against whom an inspection warrant was sought in over a decade, along with other acts. A prima facie case of reprisal was set out

under *Hochstadt v. Worcester Foundation*, 425 F.Supp. 318 (D. Mass., 1976), aff'd. 545 F.2d 222 (1st Cir., 1976), that petitioners engaged in a protected activity, defendant was aware of this activity, and adverse treatment occurred in such close proximity in time that reprisal may be inferred. Petitioners were within a protected class in championing the cause of minorities. *Novotny v. Great American Federal Savings & Loan Assn.*, 584 F.2d 1235, 1244 (3d Cir., 1978), *vacated on other grounds*, 442 U.S. 366 (1979). The district court found a genuine issue of material fact as to whether the inspections were part of a pattern of selective enforcement against those who spoke out at City Council meetings on behalf of minority rights. Appendix C, p. 22.

Further, the record showed the City engaged in malicious, irrational and plainly arbitrary acts which are not within the legitimate purview of the state's power. *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir., 1988), cert. den., sub nom *Walker v. Bello*, 488 U.S. 851 (1988).

The district court also found intent was a genuine issue of material fact in observing petitioners' claims were based on the alleged manner in which the inspections were made and the alleged motivation behind the decisions to make the inspections. Appendix C, p. 18.

The lower court's decision conflicts with these decisions of this Court as to a prima facie case and the basis for summary judgment. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Rather, the lower court relied on *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), a *New York Times v. Sullivan*, 376 U.S. 254 (1964), case, wherein a showing of actual malice or wanton disregard for the truth or falsity

of a statement is required. Civil rights cases do not require this high standard. In spite of the plethora of cases of this Court describing the prima facie case in civil rights matters, the lower court turned to a criminal case to define a prima facie case. See Appendix A, n.2.

This is an important federal question which conflicts with this Court's relevant decisions and requires review.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APEALS
FOR THE NINTH CIRCUIT

1120 CENTRAL CONDOMINIUMS OWNERS ASSOCIATION; MICHELLE A. BRENDEL; BRUCE M. STARK, Plaintiffs-Appellants, v. CITY OF SEAL BEACH; EDNA WILSON; GWEN FORSYTHE; FRANK LASZLO; MARILYN HASTINGS; WILLIAM DOANE; GEORGE BROWN; JERRY BANKSTON; LEE WHITTENBERG; BARRY CURTIS; MICHAEL CHO; DON COX, dba COX CONSTRUCTION CO., Defendants-Appellees.	No. 94-55435 D.C. No. CV-93-00360-LTL **MEMORANDUM*** (Filed June 21, 1995)

Appeal from the United States District Court
for the Central District of California
Lawrence T. Lydick, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Submitted June 8, 1995**
Pasadena, California

Before: PREGERSON, POOLE, and D.W. NELSON, Circuit Judges.

Bruce Stark, Michelle Brendel, and the 1120 Central Condominiums Owners Association (collectively "Stark") appeal the district court's summary judgment for the City of Seal Beach and other defendants (collectively "City"), and contractor Donald Cox, on Stark's §§ 1983, 1985(3) and 1986 claims. We have jurisdiction under 28 U.S.C. §§ 1291. We review de novo the district court's summary judgment, *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994), and we affirm.[1]

I

The district court concluded that Stark could not make out a § 1983 claim because he had introduced insufficient evidence of actionable conduct within the year preceding suit. We agree.

Suits under 42 U.S.C. § 1983 are governed by a one-year statute of limitations in California. *De Anza Properties X. Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1085 (9th Cir. 1991); *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). Even

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** Pursuant to Ninth Circuit Rule 34-4, the panel unanimously finds this case suitable for disposition without oral argument.

[1] Stark's motion to allow filing of his reply briefs is granted. Stark's motion to strike the City's supplemental excerpt of record is denied.

under a continuing violation theory, Stark must still introduce evidence of at least one related act which falls within the limitations period. *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1480 (9th Cir. 1989).

We consider in turn each instance of alleged actionable conduct during the year preceding suit.

A

The district court concluded that no federal claims could be predicated on the December 1992 inspection of the condominiums because City officials obtained valid consent to the inspection. We agree. City officials sought to inspect the laundry facilities at the condominiums. Tenant Susan Malherbe consented to this search, as she attested in a signed declaration. So long as Malherbe's consent was valid and she had authority to consent, the City could conduct this warrantless search without violating the Fourth Amendment. *United States v. Matlock*, 415 U.S. 164, 171 (1974).

We conclude that Malherbe's consent was valid. While Stark argues that Malherbe's consent may have been coerced, her declaration to the contrary notwithstanding, no evidence supports this contention. Stark references a portion of Malherbe's deposition in which she discusses her cotenant objecting to the March 8 search. This has no bearing on whether Malherbe freely consented to the December 16 search. Stark also references Malherbe's discussion of her declaration during her deposition, but Malherbe actually confirmed the truth of

her declaration then: "Q. . . . Why did you sign [the declaration]? A. 'Cause it's basically what happened."

We also reject Stark's contention that Malherbe lacked authority to consent to the laundry search. As a general matter, a third party has authority to consent to the search of areas of mutual use to which she has joint access. *Matlock*, 415 U.S. at 171 n.7; *United States v. Kelley*, 953 F.2d 562, 566 (9th Cir. 1992). Authority is to be determined by reference to three factors: "(1) whether the third person has an equal right to access the premises searched; (2) whether the defendant was present at the time the third party consented; and (3) if so, whether the defendant actively opposed the search." *United States v. Rosi*, 27 F.3d 409, 412 n.2 (9th Cir. 1994).

Here, it is undisputed that Malherbe had a key to the laundry and at the least an equal right of access. It is also undisputed that neither Stark nor Brendel were present. Therefore, Malherbe had authority to consent, and the City's search did not violate plaintiffs' Fourth Amendment rights.

B

We also find no genuine issue of material fact as to whether the March 8 search violated any constitutional rights of Stark. Neither the ex parte nature of the warrant proceeding nor any purported lack of actual notice rendered the search unconstitutional.

1

It is firmly established that nothing in the Fourth Amendment prohibits the issuance of an inspection warrant after an ex parte hearing. *Stoddard Lumber Co. v. Marshall*, 627 F.2d 984, 989 (9th Cir. 1980); *see Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 & n.15 (1978); *cf. Midwest Growers Co-op Corp. v. Kirkemo*, 533 F.2d 455, 464 n.21 (9th Cir. 1976) (noting that obtaining administrative warrant ex parte does not constitute bad faith because this is the "traditional method" for obtaining warrants). Nor does due process prohibit the issuance of an ex parte warrant. None of the numerous circuit or Supreme Court cases approving the use of ex parte administrative warrants have even hinted that the very practice approved might actually violate the federal constitution. *See, e.g., Barlow's, Inc.*, 436 U.S. at 320-21; *Stoddard Lumber Co.*, 627 F.2d at 989-90; *National-Standard Co. v. Adamkus*, 881 F.2d 352, 362-63 (7th Cir. 1989) ("[E]x parte proceedings are the normal means by which warrants are obtained in both criminal and administrative actions . . . "); *Matter of Keokuk Steel Castings*, 638 F.2d 42, 45 (8th Cir. 1981). We decline to reach such a conclusion here.

Moreover, nothing in the text of Cal. Code Civ. P. §§ 1822.50-1822.59 requires that an inspection warrant be issued after a hearing at which both parties are present. The section of the California Code on which Stark relies permits an issuing judge to examine "the applicant and any other witness." Cal. Code Civ. P. § 1822.53. There may be multiple witnesses in support of the application for a warrant, but this possibility does not amount to a requirement that both sides be present. These sections were passed to comply with the strictures on administrative

searches imposed by the Supreme Court in *Camara v. Municipal Court*, 387 U.S. 523 (1967). *People v. Tillery*, 211 Cal. App. 3d 1569, 1577, 260 Cal. Rptr. 320, 323 (1989). *Camara* itself places no restrictions on ex parte warrants. We conclude that the ex parte nature of the proceeding was not improper.

2

We also find no basis for a constitutional claim in Stark's allegation that he failed to receive actual notice of the search until it had occurred.

The City took several steps to provide notice: it sent notice by certified mail, received by a signatory at Stark's office two days before the search, and it posted notice of the search on the premises. Whether or not these steps complied with the specific notice requirement, Cal. Code Civ. P. § 1822.56, we find no constitutional violation. The Fourth Amendment's requirements do not hinge on state law. *California v. Greenwood*, 486 U.S. 35, 43 (1988). Post-search notice may in some cases be constitutionally required. *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986). However, neither this court nor the Supreme Court has ever interpreted the Fourth Amendment to impose a pre-search notice requirement. *See also People v. Lepeilbet*, 4 Cal. App. 4th 1208, 1214-15, 6 Cal. Rptr. 2d 371, 374 (1992) ("[T]he *Fourth Amendment* does not compel officials to give at least 24 hours notice before executing an inspection warrant."). Even if the City failed to give proper notice for the purposes of § 1822.56 – and we offer

no intimation that it did – that failure would not be actionable under § 1983.[2]

C

In January and February 1992, the City approved modification of the CUP for Stark's property. Stark alleges that the imposition of arbitrary conditions on that approval violated his constitutional rights. He also suggests that any cause of action based on this did not accrue until July 30, 1992, when he formally received a copy of the conditions. We cannot agree.

Federal law determines when a § 1983 claim accrues. *Gowin v. Altmiller*, 663 F.2d 820, 822 (9th Cir. 1981). In this circuit, "[t]he touchstone for determining the commencement of the limitations period is notice: a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action." *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 344 (9th Cir.), *cert. denied*, 114 S. Ct. 95 (1993) (internal quotations omitted).

Here, Stark had notice of the alleged injury on January 27, 1992. He does not dispute that he was present at the meeting at which the City Council discussed the CUP

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[2] To the extent Stark suggests the searches violated not the Fourth Amendment but his equal protection rights, because the City was engaged in selective enforcement, he has not made out even a prima facie case. *See United States v. Armstrong*, 48 F.3d 1508, 1512-13 & n.1 (9th Cir. 1995) (en banc) (to obtain even discovery on such a claim, plaintiff must present at least some evidence of discriminatory application and discriminatory intent).

with the challenged conditions. Conditions A through H were read in their entirety. The City Council then voted to sustain Stark's appeal, subject to these conditions of approval. At that time, therefore, Stark "knew or had reason to know" of the alleged infringement on his rights. Any claim based on the conditional approval of the CUP thus falls outside the statute of limitations and cannot save Stark's suit.

We also reject Stark's assertion that equitable estoppel should prevent the City from raising the statute of limitations as a defense. Stark must show that the City intended for him to rely upon delayed formal notice by delaying his filing of suit, or that he could reasonably believe so. *See Adams v. Johns-Mansville Corp.*, 876 F.2d 702, 707 (9th Cir. 1989); *Lundeen Coatings Corp. v. Department of Water and Power*, 232 Cal. App. 3d 816, 829, 283 Cal. Rptr. 551, 557 (1991). No evidence in the record supports such a conclusion. Estoppel does not apply.

D

Finally, Stark includes among his allegations a series of acts of vandalism against the plaintiffs' property. These allegations do not help. Only two incidents fall within the one year limitations period. Those incidents cannot save the complaint, however; there is no evidence in the record that the City had anything to do with the incidents, beyond Stark's speculation.

Because Stark has failed to provide evidence of any violation of constitutional rights within one year of the filing of suit, summary judgment on his § 1983 claims against the City was proper.

II

The same conclusion applies to Stark's § 1985(3) and 1986 claims. The § 1985(3) claim is subject to a one-year statute of limitation. *McDougal v. County of Imperial*, 942 F.2d 668, 673-74 (9th Cir. 1991) (§ 1985(3)). Ordinarily, a cause of action for conspiracy to deny civil rights accrues on the date of the "last overt act." *See Bergschneider v. Denver*, 446 F.2d 569, 569 (9th Cir. 1971); *Lambert v. Conrad*, 308 F.2d 571, 571 (9th Cir. 1962); *Hoffman v. Halden*, 268 F.2d 280, 302 (9th Cir. 1959). Thus, here as with the § 1983 claim, Stark must show at least one overt act within the limitations period. Neither search qualifies. Nor does the property vandalism; as mentioned above, Stark presented no evidence tying the City defendants to the vandalism. Nor do the alleged refusal to allow Brendel to access her home during a sporting event, or the alleged refusal of the City police to enforce a TRO against Don Cox; again, nothing in the record ties these acts to the defendants. Because the § 1985(3) claim fails, the § 1986 claim fails as well. *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir. 1985).[3]

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[3] Stark suggests that there are equitable issues that the district court failed to address when it granted summary judgment on all his claims. However, the fact that Stark seeks equitable relief does nothing to change the nature or proper resolution of the complaint, because "whether [an] action is in equity or in law a statute of limitations is applicable." *In re Peebles' Estate*, 27 Cal. App. 3d 163, 166, 103 Cal. Rptr. 560, 562 (1972). Stark must still show some wrongful conduct within the past year. This he has not done.

Stark also challenges the district court's decision to strike several paragraphs from his second amended complaint pursuant to Fed. R. Civ. P. 12(f). We need not address the merits of

III

Stark challenges the district court's refusal to grant him leave to amend to add a state law claim under California's Unruh Act. We discern no abuse of discretion.

The district court denied amendment on the basis of futility, as it was permitted to do. *Hinton v. Pacific Enters.*, 5 F.3d 391, 395 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1833 (1994). Amendment would have been futile because the district court would have declined to exercise its discretion to assume supplemental jurisdiction based on the "novel or complex issue[s] of State law" raised by the proposed claim. 28 U.S.C. § 1367(c) (1). The district court properly invoked one of the permitted bases for declining jurisdiction, and properly weighed the *Gibbs* factors. *See Executive Software North Am., Inc. v. United States District Court*, 24 F.3d 1545, 1555-57 (9th Cir. 1994); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Stark makes no attempt to challenge the purported novelty or complexity of the specific state issues identified by the district court. It is not enough to argue, as he does, that the same general types of claims have previously been brought in federal court. The district court did not abuse its discretion in denying amendment.

IV

Finally, Stark challenges the district court's summary judgment in favor of Cox. We find no error.

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this contention because none of the struck paragraphs alleged conduct occurring in the year prior to suit.

Stark sues Cox only for § 1985(3) and § 1986 violations. To prevail on a § 1985(3) claim, Stark must show 1) a conspiracy, 2) for the purpose of depriving a person of equal protection or the equal privileges of the law, 3) an act in furtherance of the conspiracy, and 4) a deprivation of a right or privilege of United States citizenship, or injury to the person or his property. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992).

We have carefully reviewed Stark's proposed evidence and allegations regarding Cox's involvement. In essence, Stark asks that a jury infer that, because Stark and Cox did not get along, it was Cox who vandalized Stark's property. Stark also asks the jury to infer that, because Cox and several City officials did get along, Cox and the City must have had an agreement to harass Stark for Stark's support of minority rights. There is no credible basis for making these inferential leaps; these are not "justifiable inferences." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Because a reasonable jury could not find based on the evidence proffered that Cox was part of a conspiracy, or that the vandalism constituted acts in furtherance of that conspiracy, summary judgment on the § 1985 claim was proper. Because the § 1985 claim fails, the § 1986 claim fails as well, *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir. 1985).

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

1120 CENTRAL CONDOMINIUMS OWNERS ASSOCIATION; MICHELLE A. BRENDEL; BRUCE M. STARK, Plaintiffs-Appellants, v. CITY OF SEAL BEACH; EDNA WILSON; GWEN FORSYTHE; FRANK LASZLO; MARILYN HASTINGS; WILLIAM DOANE; GEORGE BROWN; JERRY BANKSTON; LEE WHITTENBERG; BARRY CURTIS; MICHAEL CHO Defendants-Appellees.	No. 94-55435 D.C. No. CV-93-00360-LTL **ORDER** (Filed Aug. 4, 1995)

Before: PREGERSON, POOLE, and D.W. NELSON, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

1120 CENTRAL CONDOMINIUMS OWNERS ASSOCIATION, MICHELLE A. BRENDEL, and BRUCE M. STARK, Plaintiffs, vs. CITY OF SEAL BEACH, EDNA WILSON, GWEN FORSYTH, FRANK LASZLO, MARILYN HASTINGS, WILLIAM DOANE, GEORGE BROWN, JERRY BANKSTON, LEE WHITTENBERG, BARRY CURTIS, MICHAEL CHO, and DON COX, dba COX CONSTRUCTION CO., Defendants.	NO. SA CV 93-360-LTL(RWRx) ORDER (Filed Dec. 17, 1993)
CITY OF SEAL BEACH, Counterclaimant, MICHELLE A. BRENDEL, BRUCE M. STARK, AND 1120 CENTRAL CONDOMINIUMS OWNERS ASSOCIATION, Counterdefendants.	

This matter comes before the Court on the motion of defendants City of Seal Beach ("City"), Edna Wilson, Gwen Forsythe, Frank Laszlo, Marilyn Hastings, William Doane, George Brown, Jerry Bankston, Lee Whittenberg, Barry Curtis and Michael Cho ("city defendants") for summary judgment.

Plaintiffs 1120 Central Condominiums Owners Association, Michelle A. Brendel ("Brendel") and Bruce M. Stark ("Stark") assert claims under 42 U.S.C. § 1983 and 42 U.S.C. §§ 1985(3), 1986. The record reflects that plaintiffs and the City have had an ongoing dispute over plaintiffs' improvements of their condominium, located at 1120 Central Ave. in Seal Beach. City defendants have twice made entries into the condominium, in December of 1992 and on March 8, 1993, allegedly to inspect for suspected code violations. Plaintiffs allege that both of the entries were made without valid consent or a valid warrant and therefore violated their Fourth Amendment rights. Plaintiffs also allege that city defendants have selectively enforced code violations against them because they champion the rights of minorities.

CITY DEFENDANTS' MOTIONS TO STRIKE

City defendants object to and move to strike, pursuant to Fed. R. Civ. P. 12(f), certain evidence and stated genuine issues submitted by plaintiffs in their opposition to the motion for summary judgment. Fed. R. Civ. P. 12(f) provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "Under

the express language of the rule, only pleadings are subject to motions to strike." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir., 1983). Rather than filing a motion to strike under Fed. R. Civ. P. 12(f), the proper method for challenging the admissibility of evidence in an affidavit is to file a notice of objection to the challenged testimony. *Morgan v. Sears, Roebuck and Co.*, 700 F.Supp. 1574, 1576 (N.D.Ga., 1988). Since city defendants have not requested that any pleadings be struck, their motion to strike is denied.

However, the Court will assess the admissibility of all evidence submitted in ruling on the merits of the motion and will consider objections raised by the parties to evidence or other submitted material.

JUDICIAL NOTICE

City defendants also make two separate sets of requests for judicial notice. The first set, filed November 22, 1993 with city defendants' motion papers, requests judicial notice of three documents: first, an "Ex Parte Application for Issuance of Inspection Warrant" (hereinafter the "Ex Parte Application") and supporting documents, purportedly submitted to the Orange County Municipal Court on March 2, 1993 by Scott Shintani, who represents city defendants in this action; second, an "Inspection Warrant" (hereinafter the "warrant") purportedly issued on March 2, 1993 by a judge of the Municipal Court; and third, a "Return of Inspection Warrant" (hereinafter the "Return of warrant") purportedly submitted to the Orange County Municipal Court by defendant Barry Curtis and purportedly approved on March 16, 1993 by a

judge of the Municipal Court. City defendants filed their second set of requests on December 6, 1993 with their reply papers. That set requests judicial notice of three documents: Seal Beach City Council Minutes dated October 26, 1992, July 9, 1990 and January 8, 1990.

Pursuant to Federal Rule of Evidence 201(d), "[a] court shall take judicial notice if requested by a party and supplied with the necessary information." Pursuant to subsection (b) of Fed. R. Evid. 201, in order for the court to be able to judicially notice a fact, that fact must be "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

As to the first set of requests, judicial notice of the records of other courts is proper. *Saxton v. McDonnell Douglas Aircraft Co.*, 428 F. Supp. 1047, 1049 n.5 (C.D. Cal. 1977) (Hall, J.). Here, however, the Court denies city defendants' request for judicial notice of the three documents in issue because it cannot be said that the accuracy of the Municipal Court Clerk cannot reasonably be questioned and plaintiffs' disputation of the warrant is not unreasonable.

As to the second set of requests, this Court has previously recognized that judicial notice of city council minutes is proper under *Interstate Natural Gas Co. v. Southern Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir., 1953). Here, however, city defendants request judicial notice of these minutes of Council meetings for the purpose of demonstrating that plaintiff Stark did not speak out on behalf of

certain persons at those meetings. Plaintiffs dispute this fact and have offered as support several declarations of people who were present at the meetings. It cannot be said that the accuracy of minutes of a City Council meeting concerning the content of every speaker's comments are not reasonably subject to dispute. The declarations submitted by plaintiffs have created a genuine issue and the device of judicial notice should not be used to decide that issue. This is particularly true where as here the minutes are the records of the City and members of the City government who are defendants in this case. The request for judicial notice of the minutes accordingly is denied.

RES JUDICATA

City defendants next argue that plaintiffs are barred from bringing this action because it is really an invalid collateral attack on the conditions imposed on the Conditional Use Permit ("CUP") granted for the condominium in early 1992. They cite cases holding that the proper method to challenge an administrative decision of a state agency is to seek mandamus review. Here, plaintiffs did not seek mandamus review of the CUP, and thus the decision on the CUP is res judicata. City defendants argue that plaintiffs seek through this action to bar enforcement of the CUP and related code violations.

This argument is unpersuasive because plaintiffs are not attacking the CUP or the conditions imposed on it. Although, as originally stated in the Second Amended Complaint, plaintiffs' § 1983 claim was based in part on an allegation that the conditions imposed on a CUP

granted them in early 1992 violated the California Government Code, that allegation was struck by the Court in its order of September 13, 1993. Plaintiffs' § 1983 claim is now based only on two alleged warrantless and non-consensual entries which occurred after the granting of the CUP. Although the inspections were purportedly made to enforce the conditions imposed by the CUP, plaintiffs' claims are not based on an attack on those conditions, nor on an argument that plaintiffs have not committed code violations; instead, both plaintiffs' § 1983 and §§ 1985(3), 1986 claims are based on the alleged manner in which the inspections were made and the alleged motivation behind the decisions to make the inspections. Second Amended Complaint, ¶¶ 30-33, 37, 39-42, 47. Therefore, the Court holds that plaintiffs' claims are not barred by res judicata.[1]

SUMMARY JUDGMENT

Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

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[1] In their opposition papers, plaintiffs argue that there is a genuine issue as to whether the City is estopped from requiring changes in plaintiffs' condominium or violated its own code in imposing the conditions on the CUP. First, this argument is based on the allegation, referenced above, which was struck by the Court. Second, it is irrelevant to plaintiffs' claims, as they now stand, and to the issues raised by city defendants' motion for summary judgment. Therefore, the Court will not consider this argument.

law." Fed. R. Civ. P. 56(c). "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249-250 (1986) (citations omitted). However, the evidence presented in the motion is to be viewed in a light most favorable to the opposing party. *Id.* at 255.

In cases "where the nonmoving party will bear the burden of proof at trial on a dispositive issue," the moving party need not file affidavits in support of its motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. When a motion for summary judgment is properly made and supported, the nonmoving party may not rest upon its Pleadings, but must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *see also* Local Rule 7.14.3. "Furthermore, a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *S.A. Impresa, Etc. v. Walter Kidde & Co., Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1982).

Pursuant to Fed. R. Civ. P. 56(d), courts may grant partial summary judgment, in which the court resolves only some of the issues or claims in a case while leaving others for trial.

Plaintiffs' 42 U.S.C. § 1983 Claim

42 U.S.C. 1983 provides a remedy for violations of constitutional rights committed under color of state law. Plaintiffs' claim under 42 U.S.C. § 1983 is based on two alleged warrantless and non-consensual entries of their condominium, the first in December, 1992 and the second on March 8, 1993.

City defendants admit that the two entries occurred but argue that neither violated plaintiffs' Fourth Amendment rights.

In its June 4, 1993 order, this Court recognized that, under *Conner v. City of Santa Ana*, 897 F.2d 1487, 1490 (9th Cir.), *cert. denied*, 498 U.S. 816 (1990), the entries in this case fall within the provisions of the Fourth Amendment. The Fourth Amendment, which applies to the states through the Fourteenth Amendment, prohibits unreasonable searches and seizures. U.S. Const. amend. IV. "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-529 (1967). City defendants do not contend that either entry falls into any of the carefully defined exceptions.

Plaintiffs allege that in December, 1992 defendants entered the condominium without a warrant or plaintiffs' knowledge or consent. City defendants admit that an entry was made, but claim that it was made pursuant to valid consent.

It is uncontroverted that on December 16, 1992 Barry Curtis and two building inspectors entered the laundry

room at plaintiffs' condominium, that Susan Malherbe freely consented to the entry and that she had authority to consent to the entry. The Court therefor grants summary judgment in favor of city defendants on the issue of whether the December 16, 1992 entry violated plaintiffs' Fourth Amendment rights.

Plaintiffs also allege that on March 8, 1993 defendants broke into and entered the condominium without consent or a valid warrant. City defendants allege that Curtis obtained a valid inspection warrant from the Orange County Municipal Court and have requested judicial notice of the inspection warrant. As discussed above, the Court denies that request. In our view, there is a genuine issue of material fact as to whether city defendants made the March 8, 1993 inspection of plaintiffs' condominium pursuant to a valid warrant and therefor a genuine issue of material fact concerning whether the March 8, 1993 entry violated plaintiffs' Fourth Amendment rights. City defendants' motion for summary judgment on the issue of whether the March 8, 1993 entry violated plaintiffs' Fourth Amendment rights is denied.

Plaintiffs' 42 U.S.C. §§ 1985(3), 1986 Claims

"To bring a cause of action successfully under § 1985(3), a plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right

or privilege of a citizen of the United States." *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir., 1992); *see Griffin v. Breckenridge*, 403 U.S. 88, 102-103 (1971). "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102. The Ninth Circuit has interpreted the Supreme Court holdings to allow a § 1985(3) action only where the class in question has been designated as suspect or quasi-suspect by the courts or Congress. *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir., 1985).

City defendants argue that plaintiffs can establish none of the required elements of an action under § 1985(3).[2]

Invidiously Discriminatory Animus

Plaintiffs' § 1985(3) and § 1986 claims are based on their allegations that defendants conspired to violate plaintiffs' constitutional rights in retribution for plaintiffs' championing of minority rights. Plaintiffs allege that they championed minority rights by having minority clients and speaking out on behalf of minorities at city council meetings. Those who champion the cause of a protected class are protected by § 1985(3). *Novotny v.*

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[2] City defendants make no arguments concerning plaintiffs' § 1986 claim except to note that it must fail as a matter of law if plaintiffs' § 1985(3) claim fails. Their argument is correct. *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir., 1985). Therefore, as this is the only argument city defendants make, plaintiffs' § 1986 claim stands or falls with their § 1986 claim.

Great American Federal Savings & Loan Ass'n, 584 F.2d. 1235, 1244 (3d Cir., 1978), *vacated on other grounds*, 442 U.S. 366 (1979); *see United Bhd. of Carpenters v. Scott*, 463 U.S. 825, 836 (1983) ("[t]he predominant purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters"); *Cutting v. Muzzey*, 724 F.2d 259, 260 (1st Cir., 1984).

City defendants argue that there is no evidence that plaintiffs are champions of minority rights or, even if they were, that any city defendants were aware that they were. From this they argue that if city defendants were unaware that plaintiffs were champions of minority rights, then they could not have been motivated to conspire against plaintiffs out of any animus against protected minorities. Declarations are submitted from each of the councilmember defendants and defendant City Manager Bankston, who assert that they do not recall either plaintiff appearing before the City Council either in his or her representative capacity on behalf of a client or to testify on behalf of any racial minorities or women. All city defendants except Laszlo, Hastings and Cho, whose declaration, if one exists, does not appear, assert that they were and are unaware of the racial composition of either plaintiff's clientele.

City defendants' argument is unpersuasive because plaintiffs have submitted evidence which raises a genuine issue as to whether they have spoken out on minority rights issues before the City Council, which could show that plaintiffs have championed minority rights and that city defendants were aware of the championing. In their declarations, both Stark and Brendel state that they spoke out before the City Council in opposition to a proposal to

develop an ancient Indian burial ground. These statements are corroborated by declarations based on personal knowledge from Laurence Peters and Reva Olsen, both Seal Beach residents. Peters states that he also spoke out before the Council in opposition to the proposal. Kim Lockley, a former city police officer, declares that Stark spoke "in [his] behalf as an Asian" at a July, 1990 Council meeting at which he read to the Council a letter which complained about his termination from the police force and contained allegations that other officers directed racial slurs at him. Carolyn Lindberg, who is also a former employee of the City Police Department, declares that Stark "spoke in [her] behalf as a female" at a January, 1990 City Council meeting at which she spoke to the council about a Grand Jury investigation "into nepotism, retirement abuses and harassment of residents of the City of Seal Beach by its police department." This evidence is corroborated by the declaration of Charles Antos, a Seal Beach resident.

City defendants object to this evidence of plaintiffs speaking out before the City Council on the ground that each incident occurred more than one year prior to the filing of this action and is therefore barred by the one year statute of limitations for § 1983 and § 1985(3) claims. This objection is not well-taken because there is no claim based on those incidents to be barred; plaintiffs point to these incidents only as evidence that they have championed minority rights before the Council.

City defendants attempt to refute plaintiffs' allegations that Stark spoke on behalf of Lockley and Lindberg by submitting the minutes of the City Council meetings at which Lockley and Lindberg spoke. The minutes do not

indicate that Stark spoke before the Council on behalf of either Lockley or Lindberg. City defendants have requested that the Court take judicial notice of the minutes of those Council meetings. Additionally, they object to the declarations of Lockley and Lindberg on the ground that they contradict the minutes of the meetings. As is discussed above, the Court denied the request for judicial notice of the minutes because their accuracy on this matter is not beyond reasonable dispute and because they are the records of defendants in this action. The fact that the declarations of Lockley and Lindberg contradict the minutes of the City Council meetings raises a genuine issue as to whether Stark spoke at those meetings.

City defendants also contend that none of the defendant City officials were working at the City at the time of the alleged championing. This contention is apparently false. Stark allegedly spoke on behalf of Lockley in July, 1990 and on behalf of Lindberg in January, 1990. By January, 1990, defendants Wilson, Whittenberg, Curtis and Laszlo were with the City. By July, 1990, defendants Hastings, Forsythe and Bankston had joined the City. Also, although it is unclear exactly when plaintiffs spoke out against the proposed development of the Indian burial ground, city defendants appear to concede that some, if not all, of defendant councilmembers were on the Council when that proposal came before the Council. Other arguments by city defendants on this aspect of their motion are equally unpersuasive.

Acts in Furtherance of Conspiracy

Plaintiffs allege that defendants did or caused to be done the following in furtherance of the alleged conspiracy: vandalism of plaintiffs' offices, the two entries of plaintiffs' condominium, a city police officer's refusal to allow Brendel access to her home during a sporting event, the City Police Department's refusal to enforce a restraining order placed on Cox, and special treatment given Cox in allowing him to build his home without the set-backs required of other residents.

City defendants contend that there is no evidence that they participated in any way in the alleged vandalism of plaintiffs' offices. While this contention may be correct, it is unavailing to city defendants because plaintiffs do not need to show that city defendants were involved in the alleged vandalism in order to raise a genuine issue as to whether defendants violated § 1985(3). Plaintiffs have alleged other acts committed in furtherance of the alleged conspiracy and they have raised genuine issues as to whether defendants were involved in those acts. It is, for example, uncontroverted that defendants Curtis and Whittenberg participated in both of the inspections of plaintiffs' condominium.

City defendants then contend that plaintiffs have not shown that defendants committed any act that was injurious to plaintiffs. This is incorrect. Plaintiffs must show that an act committed by defendants in furtherance of the conspiracy injured them or their property or deprived them of a right or privilege of a citizen of the United States. *Sever, supra,* 978 F.2d at 1536. As is discussed above, plaintiffs have raised a genuine issue as to

whether the acts complained of violated their Fourth Amendment rights.

City defendants contend that none of the alleged acts committed in furtherance of the conspiracy rise to the level of a constitutional violation. We disagree.

Since plaintiffs have raised a genuine issue of material fact as to whether defendants conspired to violate their constitutional rights because they championed minority rights, we deny the motion for summary judgment on plaintiffs' §§ 1985(3), 1986 claim.

Qualified Immunity

City defendants argue that they are entitled to qualified immunity from liability for their actions in making the two inspections of plaintiffs' condominium. Analysis of a qualified immunity defense depends upon two questions: (1) Was the law governing the official's conduct clearly established? and (2) Under that law could a reasonable official have believed the conduct was lawful? *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir., 1993).

City defendants argue that they are entitled to qualified immunity from liability arising from any Fourth Amendment violations. As the Court has granted summary judgment on behalf of city defendants on the issue of whether the December, 1992 entry of plaintiffs' condominium violated the Fourth Amendment, city defendants' claim for qualified immunity is now limited to a claim of immunity from liability arising from a possible Fourth Amendment violation in the March 8, 1993 entry of the

condominium. It is clearly established that either consent or a warrant is needed to conduct an inspection of a private residence. *Conner, supra,* 897 F.2d 1487; *Camara, supra,* 387 U.S. 523. This Court has previously found that there is a genuine issue as to whether the March 8, 1993 inspection was performed without a warrant. City defendants have not alleged that they had consent to make the March 8, 1993 entry. Because no reasonable official could believe that neither a warrant nor consent is necessary for an inspection of a private residence under the Fourth Amendment, the Court holds that city defendants are not entitled to qualified immunity from liability arising from a possible Fourth Amendment violation in the March 8, 1993 entry of plaintiffs' condominium.

Municipal Liability Under Monell

Three essential allegations are required to state a cause of action under § 1983 against a municipality: (1) that the defendant acted under color of law; (2) that defendant's conduct deprived the plaintiff of a federally protected right; and (3) that the municipality had a policy that caused the constitutional deprivation. *Monell v. Dept. of Social Services,* 436 U.S. 658, 694 (1978). The Supreme Court recognizes that an unofficial custom may result in constitutional deprivations. *Id.* at 690-691.

City defendants contend that plaintiffs cannot establish that the alleged constitutional violations here resulted from an official city policy or custom, arguing that the two inspections did not violate any of plaintiffs' constitutional rights and that there is no evidence that the

City had a policy of vandalizing plaintiffs' property or depriving Brendel of access to her property.

It is true that there is no evidence linking the City to the alleged acts of vandalism or the decision to not allow Brendel access to her home during the 10k race. However, as discussed above in connection with both plaintiffs' § 1983 and § 1985(3) claims, plaintiffs have raised a genuine issue as to whether the two inspections violated their constitutional rights. Notably, city defendants do not argue that there is no evidence linking the City to the two inspections. Also as discussed above, in connection with plaintiffs' § 1985(3) claim, plaintiffs have raised a genuine issue as to whether the inspections were part of a pattern of selective enforcement of purported code violations against those who spoke out at City Council meetings on behalf of minority rights. Therefore, plaintiffs have raised a genuine issue as to whether a policy or custom of the City caused their alleged constitutional injuries.

CONCLUSION

For the reasons stated above, the Court grants city defendants' motion for summary judgment on the issue of whether the December, 1992 entry of plaintiffs' condominium violated plaintiffs' Fourth Amendment rights, but denies it otherwise. Additionally, the Court holds that city defendants are not entitled to qualified immunity from liability for any Fourth Amendment violation in the March 8, 1993 inspection.

The Clerk of the Court will serve copies of this Order by United States mail upon counsel of record.

DATED: This 17 day of December, 1993.

/s/ Lawrence T. Lydick
Lawrence T. Lydick
United States
District Judge

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APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

1120 CENTRAL CONDOMINIUMS OWNERS ASSOCIATION, MICHELLE A. BRENDEL, and BRUCE M. STARK, Plaintiffs, vs. CITY OF SEAL BEACH, EDNA WILSON, GWEN FORSYTH, FRANK LASZLO, MARILYN HASTINGS, WILLIAM DOANE, GEORGE BROWN, JERRY BANKSTON, LEE WHITTENBERG, BARRY CURTIS, MICHAEL CHO, and DON COX, dba COX CONSTRUCTION CO., Defendants.	NO. SA CV 93-360-LTL(RWRx) ORDER (Filed Febr. 2, 1994)
CITY OF SEAL BEACH, Counterclaimant, MICHELLE A. BRENDEL, BRUCE M. STARK, AND 1120 CENTRAL CONDOMINIUMS OWNERS ASSOCIATION, Counterdefendants.	

This matter comes before the Court on cross motions for summary judgment. Defendants City of Seal Beach ("City"), Edna Wilson, Gwen Forsythe, Frank Laszlo, Marilyn Hastings, William Doane, George Brown, Jerry Bankston, Lee Whittenberg, Barry Curtis and Michael Cho ("city defendants") move for summary judgment and plaintiffs 1120 Central Condominiums Owners Association, Michelle A. Brendel ("Brendel") and Bruce M. Stark ("Stark") move for partial summary judgment.

Plaintiffs assert claims under 42 U.S.C. § 1983 and 42 U.S.C. §§ 1985(3), 1986. Plaintiffs and the City have had an ongoing battle over plaintiffs, improvements of their condominium located at 1120 Central Ave. in Seal Beach. City defendants have made at least two entries into the condominium, in December of 1992 and on March 8, 1993, allegedly to inspect for suspected code violations. Plaintiffs allege that those two entries were made without valid consent or a valid warrant and therefore violated their Fourth Amendment rights. In an Order dated December 17, 1993 this Court granted summary judgment in favor of city defendants on the issue of the constitutionality of the December, 1992 entry. At issue in these cross-motions is the constitutionality of the March 8, 1993 entry.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

law." Fed. R. Civ. P. 56(c). "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249-250 (1986) (citations omitted). However, the evidence presented in the motion is to be viewed in a light most favorable to the opposing party. *Id.* at 255.

In cases "where the nonmoving party will bear the burden of proof at trial on a dispositive issue," the moving party need not file affidavits in support of its motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. When a motion for summary judgment is properly made and supported, the nonmoving party may not rest upon its pleadings but must set forth specific facts showing there is a genuine issue for trial. Fed.R.Civ.P. 56(e); see also Local Rule 7.14.3. "Furthermore, a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *S.A. Impresa, Etc. v. Walter Kidde & Co., Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1982).

Pursuant to Fed. R.Civ. P. 56(d), courts may grant partial summary judgment in which the court resolves only some of the issues or claims in a case while leaving others for trial.

PLAINTIFFS' 42 U.S.C. § 1983 CLAIM

42 U.S.C. 1983 provides a remedy for violations of constitutional rights committed under color of state law. Plaintiffs' claim under 42 U.S.C. 1983 is based on an alleged unconstitutional entry of their condominium on March 8, 1993.

Under *Conner v. City of Santa Ana*, 897 F.2d 1487, 1490 (9th Cir.), *cert. denied*, 498 U.S. 816 (1990), the March 8, 1993 entry in this case falls within the provisions of the Fourth Amendment. The Fourth Amendment, which applies to the states through the Fourteenth Amendment, prohibits unreasonable searches and seizures. U.S. Const. amend IV. "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-529 (1967). City defendants do not contend that the March 8, 1993 entry was made pursuant to valid consent or that it falls into any of the carefully defined exceptions to the warrant requirement.

Rather, city defendants allege that the City obtained an inspection warrant from the Orange County Municipal Court. In support of their allegation, they submit the declaration of West Orange County Municipal Court Judge Corey Cramin who states that he issued an inspection warrant for plaintiffs' condominium on March 2, 1993. They additionally submit the purported original inspection warrant and the declaration of Barbara Lawson, deputy clerk of the West Orange County Municipal Court, who states that pursuant to an Order issued by

Judge Cramin she released the original inspection warrant. This evidence tends to show that the City obtained an inspection warrant to conduct the March 8, 1993 entry of plaintiffs' condominium. Plaintiffs do not controvert this evidence; indeed, they provide no argument on the issue of the existence of the inspection warrant. Therefore, there is no genuine issue of material fact as to whether the March 8, 1993 entry was conducted pursuant to an inspection warrant.

However, plaintiffs claim that the inspection warrant was invalid. First, they contend that the warrant was obtained through fraud in that the affidavit of city defendant Barry Curtis ("Curtis"), submitted in support of the application for the warrant, knowingly and intentionally contained false statements and omissions which amounted to false statements. Second, they contend that the Orange County Municipal Court lacked jurisdiction to issue the warrant because the application for the warrant was heard *ex parte*. Third, they contend that the City failed to comply with provisions of the warrant requiring 24-hour notice of the inspection.

A. Alleged False Statements

The Fourth Amendment requires that the affidavit submitted to establish probable cause to issue a warrant must not contain statements which the affiant knows to be false. *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978). In *Franks*, the Supreme Court established the test, in criminal cases, for validity of a warrant issued on the basis of an allegedly false affidavit: a defendant can successfully challenge a search warrant by showing by a

preponderance of the evidence that the affidavit upon which the finding of probable cause for the warrant was based contained false statements and that without those false statements the affidavit fails to establish probable cause. 438 U.S. at 155-156. The *Franks* test is applicable in civil § 1983 actions. *Perlman v. City of Chicago*, 801 F.2d 262, 264 (7th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987); *Krohn v. United States*, 742 F.2d 24, 26 (1st Cir. 1984); *Schertz v. Waupaca County*, 683 F.Supp. 1551, 1569 (E.D.Wis. 1988), *aff'd*, 875 F.2d 578 (7th Cir. 1989); *Jones v. Town of Seaford, Del.*, 661 F.Supp. 864, 872 (D.Del. 1987); *Willocks v. Dodenhoff*, 110 F.R.D. 652, 656 (D.Conn.), *aff'd*, 805 F.2d 392 (2d Cir. 1986). The affidavit upon which a finding of probable cause is based is presumed to be valid. *Willocks, supra*, 652 F.R.D. at 657; *Jones, supra*, 661 F.Supp. at 873; *see Franks, supra*, 438 U.S. at 171. The determination of whether the affidavit without the alleged false statements creates probable cause is a question of fact. *De Anda v. City of Long Beach*, 7 F.3d 1418, 1422 (9th Cir. 1993); *Smiddy v. Varney*, 665 F.2d 261, 265 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982); *Golino v. City of New Haven*, 761 F.Supp. 962, 968-969 (D.Conn.), *aff'd*, 950 F.2d 864 (2d Cir. 1991), *cert. denied sub nom. Lillis v. Golino*, 112 S.Ct. 3072 (1992).

Plaintiffs point to six alleged false statements or omissions in the affidavit submitted by Curtis in support of the application for the inspection warrant.

1. Omission of Age of Structure

First, plaintiffs point out that the affidavit failed to note that the condominium to be searched was a new

building "rather than some 50 year old decaying structure." However, they do not argue and provide no authority showing that this information is required to be included in applications for inspection warrants. Omissions of fact amount to false statements when the omitted facts "cast doubt on the existence of probable cause." *United States v. Johns*, 948 F.2d 599, 606-607 (9th Cir. 1991) (quoting *United States v. Ellison*, 793 F.2d 942, 947 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986)), *cert. denied sub nom. Johns v. United States* 112 S.Ct. 3046 (1992). Although they make no argument as to how the age of their condominium is relevant, it appears that plaintiffs are implying that because their condominium is relatively new it cannot violate the municipal safety codes or cannot be unsafe. This contention is plainly incorrect. Furthermore, the omitted information does not cast doubt on the existence of cause. The warrant here was issued pursuant to Cal. C. Civ. P., § 1822.52, which provides, in relevant part, that "[c]ause [for the issuance of an inspection warrant] shall be deemed to exist if . . . there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises, or vehicle." The application for the warrant contained specific evidence of potential code violations. The Curtis affidavit disclosed evidence that a wall had been constructed in the condominium's garage and that 220-volt wiring and appliances had been installed in the area behind that wall. The affidavit further indicated that no permit had been issued for the construction of the wall. Resolution 4122 of the Seal Beach City Council, regarding plaintiffs' application for conditional use permit ("CUP") 12-91, found that the installation of the wiring and appliances

was unpermitted. Furthermore, the Resolution required as a condition for the CUP that the wiring, the appliances and the wall be removed. Information concerning the age of plaintiffs' condominium does not tend to refute the specific evidence of potential code violations. Thus, the omission of such information does not cast doubt on the existence of cause for the warrant. Although the existence of cause is a question of fact, which is normally decided by the jury, here no reasonable jury could find that the omission casts doubt on the existence of cause to search. *Anderson v. Liberty Lobby Inc., supra,* 477 U.S. at 249-250 ("[t]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party").

2. Stark's Statements at Meeting

Second, paragraph 8 of Curtis' affidavit reads as follows: "On November 6, 1991, I was present at a City Planning Commission hearing at which Mr. Stark and/or his attorney, Andrew Schwartz, stated that there was a microwave, a refrigerator, an electric range top/oven and 220-volt electrical wiring installed in the area behind the aforementioned walls. Mr. Stark also mentioned at that hearing that he had a dispute with his contractor throughout the remodeling of the premises regarding getting the contractor to comport to the plans." Plaintiffs apparently contend that the first sentence of paragraph 8 is knowingly false. The only support for this contention is Stark's statement, in a declaration attached to plaintiffs' opposition brief, that at a July 19, 1991 between himself and his attorney and city officials, including Curtis, he

objected to the Citys' position that the common areas had not been inspected and called in City Building Inspector Feenstra who stated that he had inspected all electrical and gas lines and had approved the covering of those lines with drywall. Stark's statement does not tend to show that Curtis' statement is false. Simply put, Stark does not refute Curtis' statement concerning what Stark stated at the November 6, 1991 meeting.

3. Relocation of Laundry Facility

a. Falsity

Third, at paragraph 13 of Curtis' affidavit, he stated that at the December 16, 1992 inspection of the condominium, he noticed that "[t]he laundry facility did not comport with the approved plans for the premises in that they had been relocated to the rear of the exterior side of the premises without the requisite permits" and that "the [laundry] facility did not comply with the requirements of the Municipal Code of the City of Seal Beach in regard to venting." In their opposition brief, plaintiffs contend that "[a] permit for the entire structure was issued and the laundry was relocated and inspected by Feenstra, including the venting." In his declaration, Stark states that the laundry room was moved before August 14, 1990 and was inspected before the final inspection on October 2, 1990.

Attached to the declaration is an invoice from Cox construction to Brendel dated August 14, 1990 which bills $450 for "Add Laundry at Utility Room"; also attached is a City of Seal Beach Building Permit for remodeling the living area, garage and deck of plaintiffs' condominium

issued April 2, 1990 which shows a final inspection on October 2, 1990. Although the Building Permit does not refer specifically to laundry facilities, it tends to show in conjunction with the invoice from Cox construction showing installation of a laundry facility at the condominium that installation of the laundry facility at some location was permitted.

The only argument city defendants provide on the truth of Curtis' statement concerning the laundry facility is that "Plaintiffs do not (and cannot) claim that a permit was issued for the relocated facilities." However, plaintiffs do apparently make that very claim. City defendants do not specify why plaintiffs cannot make that claim. Therefore, plaintiffs have raised a genuine issue as to the truth of Curtis' statement at paragraph 13 of his affidavit.

b. Existence of probable cause

Showing that there is a genuine issue of fact concerning whether a statement in an affidavit submitted in support of an application for a warrant is false is only the first step of the *Franks* test. The second step is to determine whether the false statement was necessary to the finding of probable cause. *Franks, supra,* 438 U.S. at 156; *Jones, supra.* 661 F.Supp. at 873; *Willocks, supra,* 110 F.R.D. at 659.

City defendants contend that even without the alleged false statement, probable cause for the inspection warrant existed because the application disclosed evidence of several potential code violations. City defendants' point is well-taken. As is discussed above in

connection with the first alleged omission/false statement, in addition to the alleged unpermitted relocation of the laundry facility Curtis' affidavit contains evidence of the construction of a wall in the garage at the condominium and the installation of wiring and appliances behind that wall. The affidavit further states that Curtis could find no permits for the construction of the wall; and in Resolution 4122, the City Council found that the installation of the wiring was unpermitted. Furthermore, in the Resolution the City Council required plaintiffs to remove the wiring, the appliances and the wall.[1] Thus, the evidence of the existence of the wall in the garage and the wiring and appliances behind that wall established cause that code violations or nonconformities pursuant to § 1822.52 existed at the condominium. No reasonable jury could find that cause for the warrant did not exist absent the alleged false statement. *Anderson v. Liberty Lobby Inc., supra,* 477 U.S. at 249-250.

4. Failure to Note Curtis not an Inspector

In conjunction with Curtis' statements regarding the laundry facility at paragraph 13 of his affidavit, plaintiffs complain about Curtis' failure to inform the court that he was not a "qualified inspector." Plaintiffs' complaint is not well-taken. Curtis disclosed his position with the City Department of Development Services as an Administrative Assistant at the beginning of his affidavit, so the court was aware of that information and could take it into account when making its determination of cause. Even

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[1] A copy of Resolution § 4122 was attached to the application for the inspection warrant.

though Curtis is not a qualified inspector, he is in the Department of Development Services and plaintiffs have produced no evidence tending to show that he is unable to determine whether a permit has been issued for a given construction project. In any case, this omission does not cast doubt on the existence of cause for the warrant because, as is discussed above, Curtis' affidavit and the other parts of the application for the warrant disclose specific evidence of potential code violations besides the alleged unpermitted relocation of the laundry facility. Thus, no reasonable jury could find that this omission cast doubt on the finding of cause.

5. Construction without Building Permit

Fifth, at paragraph 5 of his affidavit, in conjunction with a discussion of the wall allegedly built in the garage of plaintiffs' condominium, Curtis stated that "[c]onstruction of walls without first obtaining a building permit constitutes a violation of the Code of the City of Seal Beach" and that "[b]ased on my experience in working with the City, a building permit will be issued by the city only after plans have been submitted and approved." Plaintiffs complain that Curtis failed to state that he has no responsibility for dealing with permits, implying that he should have disclosed that information in his affidavit; they also contend that in fact permits are issued without plans being submitted.

Plaintiffs' first complaint is unavailing. As is noted above, Curtis disclosed his position with the City at the beginning of his affidavit. Thus, the municipal court knew what Curtis' position with the City was and could

take that information into account when determining if there was cause for the warrant. Furthermore, plaintiffs have not produced any evidence to show that Curtis did not know about the administration of building permits.

Plaintiffs' second contention is unsupported. Plaintiffs essentially contend that Curtis' statement that the City will issue a building permit only after plans have been submitted and approved is false. In support of this contention, Stark declares that an after-the-fact permit for new plumbing that had been installed in a building he was purchasing was issued to the broker handling the sale. He further declares that "[n]o plans existed at the time of sale for the plumbing work. . . . " additionally, Stark declares that at his deposition Curtis "identifie[d]" the permit for the plumbing. Plaintiffs attach a copy of the plumbing permit to Stark's declaration: it is entitled "Plumbing Permit-Application". It is a different type of permit than the building permits referred to by Curtis; a copy of a building permit attached to plaintiffs' opposition is entitled "Building Permit-Application". There is no indication that the City treats permits to replace plumbing fixtures in the same manner as it treats building permits such as permits to construct new walls. Thus, plaintiffs have failed to show that the City has issued after-the-fact building permits. In any case, assuming that Curtis' statement regarding building permits is false, it is not necessary to the finding of cause for the warrant. The important part of Curtis' statement was that construction of walls without a permit was a code violation. Even if the City has on occasion issued after-the-fact building permits, that does not necessarily mean that undertaking

construction without permits does not violate the municipal code. Notably, plaintiffs do not contend that Curtis' statement that nonpermitted construction violates the municipal code is false. Thus, no reasonable jury could find that cause for the warrant would be lacking as a result of the absence of the statement at issue.

6. Stark's Statements Concerning Contractor

Sixth, at paragraph 15 of his affidavit, Curtis stated that"[b]ased upon my observation of the non-permitted erection of the aforementioned walls; the statements by Mr. Stark and/or his representative Andrew Schwartz regarding the existence of electrical kitchen equipment and non-permitted 220-volt electrical wiring at the premises; my observation of a non-permitted laundry facility with improper venting at the premises and the statement by Mr. Stark regarding the difficulty in getting his contractor to comport with the plans leads me to believe that there may exist violations of the Code of the City of Seal Beach. . . . " Plaintiffs contend that Curtis misled the court by stating that Stark had difficulty with the contractor in following the plans because those problems arose before the final inspection by the City. Plaintiffs' argument is unpersuasive. First, in his affidavit Curtis specifically referred to the time at which Stark made the statement concerning his contractor, Cox. Second, Curtis' reference to Stark's statement was not misleading. The statement was relevant to show that there had been unpermitted construction at the condominium. In Resolution 4122, the City Council required that plaintiffs remove some of that unpermitted construction; thus, its potential

existence created cause to inspect. Third, even assuming that Curtis' statement amounted to a false statement, as is discussed above Curtis' affidavit contained evidence of several specific potential code violations at the condominium. Therefore, no reasonable jury could find that without the statement concerning Stark's statement about his problems with his contractor Curtis' affidavit would have failed to establish cause for the warrant.

B. Jurisdiction of Court to Issue Warrant

Plaintiffs also attack the validity of the warrant on the grounds that the Orange County Municipal Court lacked jurisdiction to issue the warrant because plaintiffs were not given notice of the hearing on the warrant or an opportunity to be heard before the issuance of the warrant. This is the first of two grounds upon which they move for summary judgment on the issue of the constitutionality of the March 8, 1993 entry.

They apparently argue that notice and an opportunity to be heard are required by both due process and the California rules of court which purportedly issued the warrant. Plaintiffs' arguments are unpersuasive. First, they have not provided any authority for the proposition that due process requires notice and an opportunity to be heard before the issuance of an inspection warrant. Indeed, the Supreme Court has assumed that there is no such requirement for either inspection or search warrants. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 319-320, fn. 15. (1978); *Fuentes v. Shevin*, 407 U.S. 67, 93, fn. 30 (1972); *Zurcher v. Stanford Daily*, 436 U.S. 547, 567 (1978). Second, the local rule cited by plaintiffs, Rule 20 of the

West Orange County Municipal Court Rules, does not apply to the issuance of inspection warrants. Rather, Rule 20 by its terms applies to *ex parte* applications in the context of civil cases. Rule 379 of California Civil Law and Motion Rules is similarly inapplicable.

C. Alleged Failure to Give Required Notice

Finally, plaintiffs contend that city defendants failed to adequately give the twenty-four hour notice of the inspection required by the warrant itself. This is the second of the two grounds upon which they move for summary judgment on the issue of the constitutionality of the March 8, 1993 entry. Plaintiffs' contention is wrong. The warrant requires that notice of the inspection be given to the "owner of the property, his agent, or the agent of the occupant(s) of the property" at least 24 hours prior to the inspection. City defendants contend that on March 5, 1993, three days before the inspection, they notified plaintiffs and the tenants of the condominium by certified mail and through posting of notices at the residence and business addresses of Stark and Brendel and at the condominium. City defendants submit as exhibits a copy of a certified mail receipt showing receipt on March 6, 1993 of a letter addressed to plaintiffs; they also submit, attached to a copy of the Return of Inspection Warrant, a note dated March 7, 1993, purportedly from one of the tenants of the condominium, indicating an awareness of the scheduled inspection the next day. Plaintiffs admit that a copy of the notice was received at their office on March 6, 1993; they also admit that notices were posted at the condominium units and at plaintiffs' home. Plaintiffs

complain that they were out of town over the weekend March 6-7, 1993, and therefore did not receive the notice until after the inspection had been conducted. This complaint is unavailing because whether plaintiffs were home to receive and see the notices is irrelevant to the issue whether the notices were timely sent and posted. City defendants' allegations that they were timely sent and posted are not controverted by plaintiffs. Plaintiffs argue that Cal. C. Civ. P., § 1020 requires notice to be sent via registered mail. § 1020 provides, in relevant part, that notice "may be given by sending the same by registered mail . . . with a request for return receipt, and the production of a returned receipt purporting to be signed by the addressee shall create a disputable presumption that such notice was received by the person to whom the notice was required to be sent." Thus, § 1020 does not prohibit the sending of notice via certified mail and the return receipt here creates the same presumption created by return receipts of registered mail. In any case, plaintiffs admit that notices were posted and sent and that someone at their office received notice. As the warrant specifically allowed service on an agent of plaintiffs, the receipt by the person at plaintiffs' office of the notice satisfies the notice requirements of the warrant.

Additionally, even assuming arguendo that city defendants failed to comply with twenty-four hour notice requirement of Cal.C.Civ.P., § 1822.56, plaintiffs have failed to show how such a failure amounts to a violation of the Fourth Amendment. A violation of statutory requirements for obtaining and executing warrant is not per se a violation of the Fourth Amendment. *California v. Greenwood*, 486 U.S. 35, 43 (1988); *see United States v. Hall*,

543 F.2d 1229, 1235 (9th Cir., 1976), *cert. denied*, 429 U.S. 1075 (1977). Plaintiffs fail to make any argument or provide any authority showing that a failure to give twenty-four hour notice of the execution of the warrant is a violation of the Fourth Amendment. Neither, *Camara v. Municipal Court*, 387 U.S. 523 (1967), nor *See v. Seattle*, 387 U.S. 541 (1967), the two seminal Supreme Court cases on Fourth Amendment limitations on inspection warrants, indicates that the Fourth Amendment requires such notice. *See People v. Lepeilbet*, 6 Cal.Rptr.2d 371 (3rd Dist., 1992), *review denied* June 17, 1992 (a failure to give twenty-four hour notice of the execution of a warrant pursuant to California Code of Civil Procedure, § 1822.56 is not a violation of the Fourth Amendment).

Conclusion Regarding Plaintiffs' § 1983 Claim

In our view none of plaintiffs' three attacks on the inspection warrant has merit and plaintiffs have failed to raise a genuine issue of material fact as to whether the March 8, 1993 entry of their condominium was made pursuant to a valid warrant. The Court accordingly grants city defendants' second motion for summary judgment as to plaintiffs' § 1983 claim and denies plaintiffs' motion for partial summary judgment.

PLAINTIFFS' 42 U.S.C. §§ 1985(3), 1986 CLAIMS

"To bring a cause of action successfully under § 1985(3), a plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges

and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir., 1992); *see Griffin v. Breckenridge*, 403 U.S. 88, 102-103 (1971). "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102. The Ninth Circuit has interpreted the Supreme Court holdings to allow a § 1985(3) action only where the class in question has been designated as suspect or quasi-suspect by the courts or Congress. *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir., 1985).

City defendants argue that plaintiffs cannot establish the fourth requirement – that plaintiffs were injured in their person or property or deprived of a federal right. Plaintiffs offer no argument on their §§ 1985(3), 1986 claims.

Those claims are based on allegations that defendants conspired to violate plaintiffs' constitutional rights in retribution for plaintiffs' championing of minority rights. The only allegations concerning how the purported conspiracy injured plaintiffs' persons or property or deprived them of federal rights are the following: (1) several acts of vandalism of plaintiffs' offices, (2) a December, 1992 entry of plaintiffs' condominium by city officials, (3) the March 8, 1993 entry of the condominium, (4) a City Police Officer's refusal to allow Brendel access to her home during a sporting event, and (5) the City Police Department's refusal to enforce a restraining order

placed on Cox. As city defendants point out, plaintiffs have failed to produce any evidence tending to show that any city defendants were involved in any of the acts of vandalism. In its December 17, 1993 Order, the Court granted summary judgment in favor of city defendants on the issue of the constitutionality of the December, 1992 entry of the condominium. In this Order, the Court has granted summary judgment in favor of city defendants on the issue of the constitutionality of the March 8, 1993 entry. Finally, plaintiffs have failed to produce any evidence tending to show that any city defendants were involved in refusing Brendel access to her home during the sporting event or in refusing to enforce the restraining order imposed on Cox. Therefore, plaintiffs have failed to raise a genuine issue of material fact as to whether they were injured by the alleged conspiracy and their § 1985(3) claim accordingly fails. If their § 1985(3) claim fails, then their § 1986 claim must fail as well as a matter of law. *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir., 1985). As a result, the Court grants city defendants, motion for summary judgment as to plaintiffs' §§ 1985(3), 1986 claims.

CONCLUSION

Plaintiffs have failed to raise any genuine issues of material fact as to their § 1983 and §§ 1985(3), 1986 claims. The Court grants city defendants' motion for summary judgment in full and denies plaintiffs' motion for partial summary judgment.

The Clerk of the Court will serve copies of this Order by United States mail upon counsel of record.

DATED: This 2 day of February, 1994.

/s/ Lawrence T. Lydick
United States
District Judge

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APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

1120 CENTRAL CONDOMINIUMS OWNERS ASSOCIATION, MICHELLE A. BRENDEL, and BRUCE M. STARK, Plaintiffs, vs. CITY OF SEAL BEACH, EDNA WILSON, GWEN FORSYTH, FRANK LASZLO, MARILYN HASTINGS, WILLIAM DOANE, GEORGE BROWN, JERRY BANKSTON, LEE WHITTENBERG, BARRY CURTIS, MICHAEL CHO, and DON COX, dba COX CONSTRUCTION CO., Defendants.	NO. SA CV 93-360-LTL(RWRx) ORDER
CITY OF SEAL BEACH, Counterclaimant, MICHELLE A. BRENDEL, BRUCE M. STARK, AND 1120 CENTRAL CONCOMINIUMS OWNERS ASSOCIATION, Counterdefendants.	(Filed Feb. 16, 1994)

This matter comes before the Court on the motion of defendant Donald Cox dba Cox Construction Co. ("Cox") for summary judgment.

Plaintiffs 1120 Central Condominiums Association, Michelle A. Brendel and Bruce M. Stark ("plaintiffs") assert a claim under 42 U.S.C. §§ 1985(3), 1986 against Cox. The record reflects that plaintiffs and the City of Seal Beach have had an ongoing battle over plaintiffs' improvements to their condominium located at 1120 Central Ave. in Seal Beach. Cox was a contractor hired by plaintiffs to make some of those improvements. Plaintiffs allege that Cox conspired with defendant City of Seal Beach ("City") and defendant City officials Edna Wilson, Gwen Forsythe, Frank Laszlo, Marilyn Hastings, William Doane, George Brown, Jerry Bankston, Lee Whittenberg, Barry Curtis and Michael Cho ("city defendants") to violate their constitutional rights.

In our view no reasonable jury could find, based on the evidence presented by this record, that Cox and the City defendants conspired because of racial animus to violate plaintiffs' equal protection rights or committed any illegal acts of vandalism in furtherance of a conspiracy between him and City defendants to violate plaintiffs' constitutional rights.

Finding no genuine issues of material fact remain to be tried on plaintiffs' claim under §§ 1985(3), 1986 against Cox, this Court grants Cox's motion for summary judgment.

The Clerk of the Court will serve copies of this Order by United States mail upon counsel of record.

DATED: This 16 day of February, 1994.

/s/ L. T. Lydick
Lawrence T. Lydick
United States
District Judge

APPENDIX F

CALIFORNIA CODE OF CIVIL PROCEDURE (C.C.P.)

§ 12. Computation of time

COMPUTATION OF TIME. The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded. *(Enacted 1872.)*

§ 12a. Computation of time; holidays; application of section

If the last day for the performance of any act provided or required by law to be performed within a specified period of time shall be a holiday, then *that* period is hereby extended to and including the next day which is not a holiday. The term "holiday" as used herein shall mean all day on Saturdays, all holidays specified in Section 6700 and 6701 of the Government Code, other than the holidays specified in *subdivisions* (c) *and (f)* of Section 6700 of the Government Code, and, to the extent provided in Section 12b, all days which by terms of Section 12b are required to be considered as holidays * * * . *However,* * * * for a period of time expiring prior to January 1, 1952, time shall be computed and extended in accordance with the provisions of this section as they existed on January 1, 1951.

This section applies also to Sections 659, 659a, 946, and 974 through 982, *inclusive,* and the periods of time severally therein prescribed or provided for, and to all other provisions of law, however stated or wherever expressed, providing or requiring an act to be performed

on a particular day or within a specified period of time. The mention of these sections is not intended and shall not be construed to exclude the application of this section to *any* other provisions of law, whether the latter are expressed in this or any other code or statute, ordinance, rule, or regulation. *(Added by Stats.1933, c. 29, p. 304, § 1. Amended by Stats.1951, c. 492, p. 1646, § 2; Stats.1955, c. 59, p. 498, § 1; Stats.1961, c. 1370, p. 3144, § 1; Stats.1982, c. 838, p. 3162, § 2, eff. Sept. 10, 1982; Stats.1994, c. 1011 (S.B.1373), § 2.)*

§ 12b. Computation of time; day on which public office closed considered holiday

If any city, county, state, or public office, other than a branch office, is closed for the whole of any day, insofar as the business of that office is concerned, that day shall be considered as a holiday for the purposes of computing time under Sections 12 and 12a. *(Added by Stats.1951, c. 655, p. 1852, § 25.)*

C.C.P. § 1020. Service; registered mail; presumption from return receipt

Any notice required by law, other than those required to be given to a party to an action or to his attorney, the service of which is not governed by the other sections of this chapter and which is not otherwise specifically provided for by law, may be given by sending the same by registered mail with proper postage prepaid addressed to

the addressee's last known address with request for return receipt, and the production of a returned receipt purporting to be signed by the addressee shall create a disputable presumption that such notice was received by the person to whom the notice was required to be sent. *(Added by Stats.1939, c. 61, p. 1004, § 1.)*

C.C.P. § 1822.50 Definition

An inspection warrant is an order, in writing, in the name of the people, signed by a judge of a court of record, directed to a state or local official, commanding him to conduct any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning. *(Added by Stats.1968, c. 1097, p. 2105, § 1. Amended by Stats.1980, c. 230, § 1.)*

§ 1822.51. Requirements for issue

An inspection warrant shall be issued * * * upon cause, *unless some other provision of state or federal law makes another standard applicable. An inspection warrant shall be* supported by *an* affidavit, particularly describing the place, dwelling, structure, premises, or vehicle to be *inspected* and the purpose for which the *inspection* is made. In addition, the affidavit shall contain either a statement that consent to inspect has been sought and refused or facts or circumstances reasonably justifying the failure to seek such consent. *(Added by Stats.1968, c.*

1097, p. 2105, § 1. Amended by Stats.1970, c. 241, p. 501, § 2; Stats.1971, c. 438, p. 861 § 20; Stats.1984, c. 476, § 2.)

§ 1822.52 Cause

Cause shall be deemed to exist if either reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to the particular place, dwelling, structure, premises, or vehicle, or there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises, or vehicle. *(Added by Stats.1968, c. 1097, p. 2105, § 1.)*

§ 1822.53. Examination of applicant

Before issuing an inspection warrant, the judge may examine on oath the applicant and any other witness, and shall satisfy himself of the existence of grounds for granting such application. *(Added by Stats.1968, c. 1097, p. 2105, § 1.)*

§ 1822.54. Issue; contents

If the judge is satisfied that *the proper standard* for *issuance of the warrant has been met,* he *or she* shall issue the warrant particularly describing each place, dwelling, structure, premises, or vehicle to be inspected and designating on the warrant the purpose and limitations of the inspection, including the limitations required by this title. *(Added by Stats.1968, c. 1097, p. 2105, § 1. Amended by Stats.1984, c. 476, § 3.)*

§ 1822.55. Duration

An inspection warrant shall be effective for the time specified therein, but not for a period of more than 14 days, unless extended or renewed by the judge who signed and issued the original warrant, upon satisfying himself that such extension or renewal is in the public interest. Such inspection warrant must be executed and returned to the judge by whom it was issued within the time specified in the warrant or within the extended or renewed time. After the expiration of such time, the warrant unless executed, is void. *(Added by Stats.1968, c. 1097, p. 2105, § 1.)*

§ 1822.56. Conduct of inspection; notice

An inspection pursuant to this warrant may not be made between 6:00 p.m. of any day and 8:00 a.m. of the succeeding day, nor in the absence of an owner or occupant of the particular place, dwelling, structure, premises, or vehicle unless specifically authorized by the judge upon a showing that such authority is reasonably necessary to effectuate the purpose of the regulation being enforced. An inspection pursuant to a warrant shall not be made by means of forcible entry, except that the judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of a violation of a state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning, which, if such violation existed, would be an immediate threat to health or safety, or where facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful. Where prior

consent has been sought and refused, notice that a warrant has been issued must be given at least 24 hours before the warrant is executed, unless the judge finds that immediate execution is reasonably necessary in the circumstances shown. *(Added by Stats.1968, c. 1097, p. 2106, § 1. Amended by Stats.1980, c. 230, § 2.)*

§ 1822.57. Refusal to permit authorized inspection; offense

Any person who willfully refuses to permit an inspection lawfully authorized by warrant issued pursuant to this title is guilty of a misdemeanor. *(Added by Stats.1968, c. 1097, p. 2106, § 1.)*

CALIFORNIA RULES OF COURT

RULE 379. EX PARTE APPLICATIONS AND ORDERS

An application for an order shall not be made ex parte unless it appears by affidavit or declaration (1) that within a reasonable time before the application the party informed the opposing party or the opposing party's attorney when and where the application would be made; or (2) that the party in good faith attempted to inform the opposing party and the opposing party's attorney but was unable to do so, specifying the efforts made to inform them; or (3) that for reasons specified the party should not be required to inform the opposing party or the opposing party's attorney.

West Orange County Municipal Court Rules

PART III
RULES GOVERNING CIVIL MATTERS

RULE 20 EX-PARTE APPLICATIONS AND ORDERS (Eff. 11/1/88)

Opposing party or counsel shall be advised personally or by completed telephone call to such party or counsel or to a subject described four (4) hours or more before the ex-parte application; or if unable to do so, that the efforts made shall be fully described; or that for the reasons specified, the party should not be required to inform the opposing party or the opposing party's counsel.

At the ex-parte hearing, the applicant shall submit a sworn declaration setting forth the facts required in this rule, naming the person contacted and the time (hour) of contact.

Documents submitted shall contain the case name, number, nature of the ex-parte application, and a statement that it is an ex-parte application. Further, such documents shall be submitted no later that 8:15 a.m. for the morning hearing or 1:15 p.m. for afternoon hearing.